No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ATTORNEYS GENERAL OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, COLORADO, GEORGIA, IDAHO, INDIANA, LOUISIANA, MICHIGAN, MISSOURI, NEVADA, NORTH DAKOTA, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND WYOMING, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are their respective States' chief law enforcement or chief legal officers and hold authority to file briefs on behalf of their offices.

Amici's interest arises from two responsibilities. *First*, as chief law enforcement or chief legal officers, amici have an overarching responsibility to protect their States' consumers. *Second*, amici have a responsibility to protect consumer class members under CAFA, which provides a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 6 (requirement "that notice of class action settlements be sent to appropriate state and federal officials," exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *id.* at 34 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

Consistent with these responsibilities, state Attorneys General actively monitor proposed class action settlements in federal court in an ongoing effort to protect consumers from abuse in the class action settlement process. State Attorneys General also speak against unfair settlements by filing briefs

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[1] Pursuant to Rule 37.6, amici certify that no parties' counsel authored this brief and only amici or their offices made a monetary contribution to the brief's preparation or submission. Counsel of record for all parties received notice of amici's intent to file at least ten days prior to this brief's due date and have given written consent.

under CAFA, often with bipartisan support. *See e.g., In re Google Inc. Cookie Placement*, No. 17-1480, Dkt. 29 (3d Cir.) (brief of thirteen-state, bipartisan coalition urging reversal of *cy pres*-only settlement); *In re EasySaver Rewards Litigation*, No. 16-56307, Dkt. 21 (9th Cir.) (brief of thirteen-state, bipartisan coalition urging reversal of imbalanced coupon settlement); *Cannon, et al. v. Ashburn Corp.*, No. 16-1452, Dkt. 68-3 (D.N.J.) (brief of nineteen-state, bipartisan coalition urging rejection of imbalanced coupon settlement). And these efforts have helped generate meaningful outcomes for consumers. *See, e.g., Allen v. Similasan Corp.*, No. 12-cv-376, Dkts. 219, 223, 257, 261, 268 (S.D. Cal.) (after Arizona-led coalition filed *amicus* brief and District Court rejected initial deal, revised settlement was reached that increased the cash recovery to the class from $0 to ~$700,000).

The Attorneys General, acting in a bipartisan coalition, submit this brief to further these interests and continue the ongoing CAFA efforts of state Attorneys General. Amici are able to offer a unique perspective on class action matters that should aid the Court in its analysis. Based on that experience, amici urge the Court to prohibit *cy pres*-only class action settlement arrangements and confirm strict limits on the use of *cy pres* to ensure that consumers are not relegated to an afterthought in the class action settlement process.

SUMMARY OF ARGUMENT

A settlement cannot be in the class's best interest or fair, adequate, and reasonable under Rule 23 where it releases millions of consumer claims, generates millions of settlement dollars, and yet the class languishes without direct compensation—the touchstone of a class settlement under Rule 23(b)(3) must be a direct class benefit.

Cy pres diverts settlement compensation from the class while heightening the risks consumers already face in the class action settlement process. And *cy pres*-only deals, which release class claims yet block consumers from receiving any direct benefit, represent the worst possible outcome for consumers. This type of arrangement is precisely why courts are tasked with policing the "inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees[.]" *Staton v. Boeing Co.*, 327 F.3d 938, 972 n.22 (9th Cir. 2003).

Cy pres-only settlement arrangements are a judicial creation that this Court has never blessed; the Court should not do so now. The Court should confirm that: (1) *cy pres*-only deals are *per se* invalid because class action settlements under Rule 23(b)(3) must include a direct class benefit, and (2) given *cy pres*'s lack of direct class benefit, Rule 23 prevents using *cy pres* amounts to reach a fair, adequate, and reasonable determination or award attorneys' fees as part of a court's settlement analysis. Confirming these points would constrain *cy pres* (to the extent allowed at all under Rule 23) to its only potentially proper role: addressing relatively immaterial remainder amounts in class actions that otherwise provide a direct benefit to consumers.

ARGUMENT

I. *CY PRES* HARMS CONSUMER CLASS MEMBERS, ESPECIALLY AS BLESSED BY THE NINTH CIRCUIT

A. IMPORTATION OF *CY PRES* TO CLASS ACTIONS DIVERTS COMPENSATION FROM CLASS MEMBERS AND MAGNIFIES PROBLEMS CONSUMERS ALREADY FACE IN THE CLASS ACTION SETTLEMENT PROCESS

The use of *cy pres* in the class action settlement context is a judicial creation (imported from the trust arena), which has had the effect of diverting compensation away from the class members whose interests are supposed to be served by class actions. Yet sending settlement funds directly to class members is a critical component of resolving class actions. Class members extinguish their present (and sometimes future) claims in class action settlements. And since class members extinguish these claims in exchange for settlement funds, those "settlement funds are the property of the class[.]" *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015); *see also Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members."); American Law Institute, Principles of the Law of Aggregate Litigation § 3.07, cmt. b (2010) ("funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members"). [2]

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[2] This key aspect of Rule 23 settlements—the release of claims in exchange for settlement funds—is in marked contrast

Cy pres's diversion of settlement funds away from consumers is particularly concerning because consumers already face disadvantages in the class action settlement process. Most notably, in dividing settlement funds that are obtained via the release of class members' claims, the interests of class members and others often diverge.[3] There is an ever-present risk of conflict between class counsel and the class because counsel has an incentive to obtain a large fee, which invariably comes from class members' pockets. *See, e.g.*, *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("interests of class members and class counsel nearly always diverge"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) ("'class actions are rife with potential conflicts of interest between class counsel and class members'"); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 720 (E.D. N.Y. 1989) (noting need to protect the "[c]lass from whose pockets the attorney's fees will come[.]").

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to statutorily based actions by state Attorneys General for the benefit of consumers, which are almost always brought and resolved without directly representing consumers or releasing consumer claims.

[3] Consumers also face procedural hurdles, including being only indirectly represented, having to make interest-based determinations with limited notice documentation, and facing burdens in raising concerns with the court. *See, e.g.*, *Radcliffe v. Experian Information Solutions Inc.*, 715 F.3d 1157, 1163–64 (9th Cir. 2013) (incentive awards undermine adequacy of class representatives); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013) (discussing class representatives' failure to protect absent class members' interests); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 198 (5th Cir. 2010) (notice failed to provide "interested parties with knowledge critical to an informed decision as to whether to object[.]").

And defendants have no incentive to help correct for this risk of conflict between the class and class counsel. "[A] defendant who has settled a class action lawsuit is ultimately indifferent to how a single lump-sum payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 820 (2003). "[A]llocation ... is of little or no interest to the defense." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995). The fee and class award "represent a package deal," *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996), with a defendant "'interested only in the bottom line: how much the settlement will cost him.'" *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015).

Indeed, there is an "inherent risk" in class action settlements of "class counsel ... collud[ing] with the defendants, 'tacitly reducing the overall settlement in return for a higher attorney's fee.'" *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). Both Congress and the courts have noted that coupon settlements are an example of this problem. *See, e.g., In re HP Inkjet*, 716 F.3d at 1178 ("[B]y decoupling the interests of the class and its counsel, coupon settlements may incentivize lawyers to 'negotiate settlements under which class members receive nothing but essentially valueless coupons, while the class counsel receive substantial attorney's fees.'" (quoting S. Rep. No. 109–14, at 29–30)).

Cy pres arrangements are a particularly salient example of this inherent risk playing out—as with coupons, *cy pres* presents a "conflict of interest

between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *In re Baby Prods.*, 708 F.3d at 173; *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 834 (9th Cir. 2012) (noting "incentive for collusion" in *cy pres* class settlements; "the larger the *cy pres* award, the easier it is to justify a larger attorneys' fees award.").

It is easy to find examples where *cy pres* is relied upon to increase an attorneys' fee award without a concomitant benefit to the class. *See, e.g., In re Baby Prods.*, 708 F.3d at 169-70 (attorneys requested ~$14 million as a percentage of the $35.5 million settlement, where ~$18.5 million was designated for *cy pres* and only ~$3 million to consumers); *Dennis v. Kellogg Co.*, 697 F.3d 858, 862 (9th Cir. 2012) (counsel requested ~$2 million in fees from a $10.64 million settlement where ~$7.4 million went to *cy pres* and only $800,000 to consumers).

And defendants may prefer *cy pres* over other class action resolution options. *See, e.g., Lane*, 696 F.3d at 834 (defendant "may prefer a *cy pres* award ... for the public relations benefit"); *S.E.C. v. Bear, Stearns & Co., Inc.*, 626 F. Supp .2d 402, 415 (S.D. N.Y. 2009) (*cy pres* may "actually benefit[] the defendant rather than the plaintiffs," as "defendants reap goodwill from the donation of monies to a good cause"); *see also Google and Facebook's New Tactic in the Tech Wars*, Fortune (July 30, 2012) (noting existing corporate donations to many proposed *cy pres* recipients and support on cases and issues those recipients often give to donating corporations). This may help explain why *cy pres* recipients often drift far from the subject of the action, *see infra* at Section II.A,

and why "groups have now started lobbying for cy pres distributions[.]" *Lane v. Page*, 862 F. Supp. 2d 1182, 1234 (D.N.M. 2012); *see also* Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1035–1036 (2009) (noting examples of groups requesting or welcoming *cy pres*).

B. *Cy Pres*-Only Deals Threaten Consumers The Most, Even As Their Supporting Rationale Is Inconsistent With Congressional And Judicial Class Action Standards

Cy pres-only settlement arrangements embody the worst flaws of the class action settlement system and are notable in their disservice to consumers. In *cy pres*-only deals, defendants and class counsel secure their own goals from the litigation while bypassing the class—the class receives no payment, indeed no direct benefit, even as millions change hands in the settlement and class members' claims are extinguished in sweeping numbers. Worse than merely imbalanced *cy pres* settlements, which inherently threaten class members' interests by diverting to third parties (at times substantial) compensation that belongs to the class, *cy pres*-only arrangements circumvent the class completely.

The foundational assumption underpinning a pre-certification, *cy pres*-only deal is that, *ab initio*, there is no way to direct a single dollar of direct value to the absent members of the class that is being offered for certification. Yet acceptance of this foundational assumption calls into question how such a deal, and certification of such a class, could meet the standards that Congress and the courts have placed on the class action procedural tool; indeed, on several

grounds, it appears that such a deal would fail to comport with what the Court and Congress require.

First, inasmuch as *cy pres*-only settlements stem from unascertainability of the class (either because the class cannot be adequately identified to ensure a proper distribution or reached with sufficient confidence to support a distribution), the settlement cannot meet the foundational Rule 23(b)(3) requirement that a class action serve a particular, known, ascertainable class. *Carrera v. Bayer Corp.*, 727 F.3d 300, 305 (3d Cir. 2013) (determining whether class is ascertainable is "'an essential prerequisite of a class action ... under Rule 23(b)(3).'"); *see also Marcus v. BMW of North America, LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012) (gathering sources). Ascertainability requires (at minimum) that the class is defined clearly using objective criteria, *see Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015), or that there is an "administratively feasible" method for determining whether someone is in the class, *Carrera*, 727 F.3d at 306. But blessing *cy pres*-only settlements obviates any need for ascertainability because the class contours no longer matter; whether class members can be identified using objective criteria or in an administratively feasible manner is of no consequence to a court that is blessing a deal where no compensation will be distributed to class members directly and the only class effect is a release of the now-aggregated claims.

Second, a class action that cannot provide a direct benefit to the purported class cannot be a superior method of adjudication. Before a court may certify a class under Rule 23(b)(3), the court must find "'that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'"

Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011). But *cy pres*-only deals (in particular pre-certification *cy pres*-only deals) effectively aggregate consumer claims solely for purposes of accomplishing a single, aggregate release—in such a deal, there is no direct class benefit, just a mass release of now-aggregated claims. This cannot be a superior adjudication method from the perspective of class members. Aggregation of consumer claims through a private class action solely for purposes of releasing the claims without direct class benefit cannot be superior to leaving consumers with their claims, whatever the value of those claims might be. The Rule 23(b)(3) class action procedural mechanism is surely meant to provide a superior means of delivering something directly to the class, not a superior means for defendants to obtain an aggregate release at a bulk-discount price.

Third, certifying a class for which the only feasible relief is a *cy pres* distribution to a third party requires interpreting Rule 23 in violation of the Rules Enabling Act. In certifying a class under Rule 23 (even as part of a settlement), a court must bless both the class's cohesion as well as its desired relief, recognizing that the Rules Enabling Act "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). Where (as here) class actions are brought under substantive laws that only permit recovery of compensatory damages for the class, it would enlarge the substantive rights of the plaintiffs to certify a class in which all compensation is instead directed towards third parties. This error would essentially "transform substantive law 'from a compensatory remedial structure to the

equivalent of a civil fine.'" *See Klier*, 658 F.3d at 481 (quoting Redish, *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 641 (2010)); *cf. Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (procedural rules allowing multiple claims do not violate Rules Enabling Act because they "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights.").

C. Given Its Risks, Courts Have Rightly Criticized *Cy Pres* And Focused On The Need For Direct Class Benefit, But The Ninth Circuit Has Blessed Free Use Of *Cy Pres*

It should be no surprise that judges from across the country have been plainspoken in their appraisal of *cy pres*'s failings. *See, e.g.*, *In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d 1097, 1111 (D.N.M. 2012) ("*cy pres* awards are a bad idea and inappropriate, because they inject a third party into the litigation, do not adequately reflect the best interests of absent class members, create an appearance of impropriety, and are not the best use of the Court's time and resources."). Judges are placed in the role of fiduciary for the absent class members. *E.g.*, *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987) ("In approving a proposed class action settlement, the district court has a fiduciary responsibility to ensure that 'the settlement is fair and not a product of collusion.'"). And this duty is especially important when settlements are offered prior to formal class certification. *E.g.*, *In re Bluetooth*, 654 F.3d at 946 ("Courts have long recognized that

'settlement class actions present unique due process concerns for absent class members.'"); *id.* ("Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement.").

Reflecting this duty toward the class, and the dangers of *cy pres*, even where courts have stopped short of *per se* rejecting *cy pres*, they have rightly focused on ensuring a direct class benefit in connection with any class settlement with a proposed *cy pres* component. Most notably, the Third Circuit has introduced as a specific *cy pres* consideration "the degree of direct benefit provided to the class," while emphasizing that "*cy pres* awards should generally represent a small percentage of total settlement funds." *In re Baby Prods.*, 708 F.3d at 174.

Notwithstanding these criticisms, and the necessary focus on the direct class benefit, the Ninth Circuit has blessed free use of *cy pres*-only distributions whenever there is a large class, which relegates the class to an afterthought and is exactly the type of approach to *cy pres* that is inconsistent with congressional and judicial class action requirements. *See* Section I.B. In weighing *cy pres*, the Ninth Circuit asks only whether the *pro rata* distribution of the proposed settlement fund over the full class would result in a *de minimis* amount, and is clear that *cy pres* is to be blessed in such a circumstance even if there are alternative options that would provide a direct class benefit; put simply, the Ninth Circuit requires only that a court turning to *cy pres* reach a determination that "'the proof of individual claims would be burdensome or distribution of damages costly.'" Pet. App. 8 (quoting *Lane v. Facebook, Inc.*, 696 F.3d at 819). But in almost every large

class action, the proof of individual claims will be burdensome in some respect (hence the need to aggregate the claims in the first place), and the distribution of damages costly (because distributions across large numbers of claimants or class members are, by their nature, costly).

II. IF THE COURT DOES NOT BAR ALL *CY PRES*, IT SHOULD CONFIRM THAT *CY PRES*-ONLY DEALS ARE *PER SE* INVALID AND *CY PRES* AMOUNTS CANNOT SUPPORT A RULE 23 FAIRNESS DETERMINATION OR FEES

Given the numerous risks that *cy pres* as a whole presents, the Court may well determine that all uses of *cy pres* in the class action settlement context are impermissible under Rule 23(e)'s "fair, reasonable, and adequate" inquiry. But, to the extent the Court does not foreclose all uses of *cy pres*, it should certainly provide clarification that (1) *cy pres*-only deals under Rule 23(b)(3) are *per se* invalid because *cy pres* provides no direct class benefit, and (2) given the lack of direct class benefit from *cy pres*, Rule 23 prevents using any *cy pres* sums to reach a fair, adequate, and reasonable determination or award attorneys' fees for cases settled under Rule 23(b)(3).

A. THE COURT SHOULD BAR *CY PRES*-ONLY DEALS, CONFIRMING THAT A RULE 23(B)(3) CLASS ACTION MUST DELIVER A DIRECT CLASS BENEFIT

The Court should reject Rule 23(b)(3) *cy pres*-only settlements as *per se* invalid because they lack a direct benefit to the class. "Rule 23 of the Federal Rules of Civil Procedure is meant to provide a vehicle

to compensate class members and to resolve disputes." *In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d at 1105. And Rule 23 is to be "applied with the interests of absent class members in close view." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 629 (1997). It is therefore critical that any class action settlement under Rule 23(b)(3) include a direct benefit to the class—otherwise, the class action being certified and judicially approved serves only to allow defendants to aggregate claims solely for purposes of extinguishing them.[4]

Yet *cy pres* distributions themselves do not directly benefit the class; in the place of the traditional direct benefit to the class in exchange for the extinguishment of their claims, *cy pres* deals substitute an indirect benefit. *See, e.g., Lane v. Facebook, Inc.*, 696 F.3d at 819 ("A cy pres remedy ... is a settlement structure wherein class members receive an indirect benefit ... rather than a direct monetary payment").

And courts have readily noted that the "indirect benefit" received by the class from *cy pres* in place of direct compensation "is at best attenuated and at worse illusory." *In re Baby Prods.*, 708 F.3d at 173. Even setting aside the foundational concern that "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else," *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004), the *cy pres* distribution is often so tenuously connected to the class's claims that it can

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[4] Rule 23(b)(3) class actions present different considerations than those under (b)(1) and (b)(2). Rule 23(b)(3) actions are focused specifically on "individualized monetary claims," whereas under (b)(1) or (b)(2), "individual adjudications [are] impossible or unworkable" or "the relief sought must perforce affect the entire class at once." *Dukes*, 564 U.S. at 361-62.

hardly be said to provide any benefit to class members. For example, a *cy pres* distribution to "a scholarship program" named after the defendant, "two museums," and "a local history and genealogy library" have been offered to resolve a suit relating to an agrochemicals plant, exposure to arsenic, and contracting cancer. *Klier*, 658 F.3d at 473. In another example, a *cy pres* distribution to Family House Toledo—a charitable organization that offers emergency family housing in Toledo—was used in resolving a multidistrict class action alleging antitrust violations relating to foam in consumer products, even though the district court acknowledged that "few class members likely reside in Northwest Ohio." *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 621, 625 (N.D. Ohio 2016). And the list goes on. *See e.g. Schwartz v. Dallas Cowboys Football Club Ltd.*, 362 F. Supp. 2d 574, 577 (E.D. Pa. 2005) (awarding a *cy pres* remainder in an antitrust case, even after noting that such distribution "would not further the goals of the antitrust laws"); *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1395–99 (N.D. Ga. 2001) (approving *cy pres* distribution to Georgia-based charities, including The Make-a-Wish Foundation of Greater Atlanta and North Georgia as well as the American Red Cross's Atlanta chapter, in a multidistrict, price-fixing class action over NASCAR race souvenirs).

In the absence of a direct benefit to the class, a proposed *cy pres* settlement cannot pass muster under basic conceptions of fairness, much less Rule 23's specific requirements. A tenuous, illusory benefit from a third-party distribution does not match the purposes of Rule 23, and should not be blessed as serving the interests of the class or being fair, adequate, and reasonable. The solution is

simple: require a direct benefit to the class for actions under Rule 23(b)(3) and reject the use of *cy pres*-only arrangements that by their nature cannot satisfy this basic consumer protection requirement.

B. The Court Should Further Confirm That Because *Cy Pres* Does Not Provide A Direct Class Benefit, It Cannot Support A Rule 23(e) Fairness Determination Or The Award Of Fees

Because *cy pres* amounts do not provide a direct class benefit, they cannot be treated as providing an adequate basis for approving a settlement or awarding fees in a class action—it is critical that any settlement purporting to use *cy pres* is able to stand on its own, without considering the *cy pres* sums. This will ensure consumers are protected from imbalanced settlements where *cy pres* dwarfs the direct class benefit, and that the interests of class counsel and defendants are aligned toward the key goal of class action settlements: ensuring that class members receive the benefits bargained for in exchange for the release of their claims.

Even where a settlement contains class member awards beyond *cy pres*, the class (or even just a subset of the class) can often receive at most a nominal direct benefit and effectively suffer all the harms of a *cy pres*-only deal. For example, when claims-made structures are paired with a *cy pres* provision for unclaimed funds, the resulting settlements can direct almost all funds to *cy pres*. The Ninth Circuit recently heard oral argument in such a case, where, after the close of the claims process, the proposed distribution would send over 90% of the claims-made settlement fund to *cy pres*. *In re Easysaver Rewards*

Litigation, No. 16-56307, Dkts. 21, 76, 77 (9th Cir.) (detailing distribution plan featuring ~$4 million to *cy pres*, ~$8.5 million in fees, and only ~$250,000 to consumers). And this case is not unique. *See, e.g.*, *Zeisel v. Diamond Foods, Inc.*, No. 10-01192, Dkt. 243 at 2 (N.D. Cal.) (distributing ~$2.2 million worth of donations to *cy pres* recipient where the class only recovered ~$370,000); *Hartless v. Clorox Co.*, No. 06-cv-02705, Dkts. 137 at 1, 138 (S.D. Cal.) (approving distribution of ~$3.9 million to *cy pres* recipients after only ~$2.3 million was received by the class).

These types of settlements no more comport with Rule 23 than *cy pres*-only deals; if a settlement cannot stand absent consideration of *cy pres* amounts (whether because it is *cy pres*-only or an imbalanced *cy pres*-focused deal), then it cannot be deemed fair, adequate, and reasonable by a federal court. These imbalanced arrangements are judicially blessed only when a court commits the error of treating the *cy pres* award as adequate compensation for the release of class members' claims (in lieu of a direct benefit). But, as noted above, the direct class benefit is central to the fairness of a settlement. And the question is not just whether there is *any* direct class benefit, but whether there is *adequate* direct class benefit to warrant the release of the class members' claims and approval of the proposed settlement.

The Court should confirm the need for an *adequate* direct benefit by clarifying that, given the lack of direct class benefit from *cy pres*, Rule 23 prevents using any *cy pres* sums to reach a fair, adequate, and reasonable determination or award attorneys' fees in cases settled pursuant to Rule 23(b)(3). This analytical framework would properly acknowledge the

failure of *cy pres* to directly benefit the class, ensure that settlements are only approved with adequate direct class benefit, and do so without preventing courts from relying on *cy pres* to address the complex question of what is to be done with relatively immaterial remainder amounts in claims-made settlements, where the costs of distribution would exhaust the available funds: *e.g.*, where $25,000 remains available but additional direct notice or distribution costs would total $45,000.[5]

Put simply, this guidance would confirm that *cy pres* cannot be used to circumvent the class and create the illusion of fairness; it can only be used (if at all) if it is wholly ancillary to an otherwise fair, adequate, and reasonable settlement arrangement. This guidance would also serve the overarching goal of aligning the often-divergent interests in the class action settlement process by giving class counsel in particular an incentive to resort to *cy pres* only for amounts that are immaterial to the settlement as a whole. *Cf. Pearson v. NBTY*, 772 F.3d 778, 781 (7th Cir. 2014) ("Basing the award of attorneys' fees on [the ratio of fees to the fees plus what class members actually receive] ... gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class"); *In re TJX Cos. Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 406 (D. Mass. 2008) ("tying the award of attorneys' fees to claims made by class members ... will not only encourage more

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[5] Practically, this may require a two-step (or more) fee award in some cases, with the final fee analysis and award only coming after the claims process has ended and *cy pres* amounts (to the extent proposed) are fully known and calculable.

realistic settlement negotiations and agreements, but also will drive class counsel to devise ways to improve how class action suits and settlements operate"). And we know that when parties are properly incentivized to direct would-be *cy pres* distributions to class members, consumer-positive outcomes follow. For example, in *Fraley v. Facebook Inc.*, the court rejected a *cy pres*-only deal, leading counsel to turn to a claims-made process that distributed ~$20 million amongst class members. 966 F. Supp. 2d 939, 943 (N.D. Cal. 2013).

As a district court explained in connection with an analogous set of class action settlement concerns:

> At bottom, class action litigation should benefit the individuals who have been harmed. To be sure, class action lawsuits have a valuable deterrent role to play, and there is therapeutic and punitive value in requiring defendants to pay for wrongful conduct, regardless of to whom those monies are transferred. But these considerations ought not cause courts complacently to abide an institution that fails efficiently and effectively to deliver relief into the hands of those in whose name it was established—the class.

TJX Cos., 584 F. Supp. 2d at 406.

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"Whatever the superficial appeal of *cy pres* in the class action context may have been, the reality of the practice has undermined it." *Klier* at 481. To the extent *cy pres* serves any place in the class action settlement process, it is in handling relatively immaterial, remainder amounts in claims-made settlements, where the costs of additional notice and

distribution would literally exhaust the available funds. State Attorneys General are repeatedly engaged in the class action settlement process, looking out for the interests of their consumers and speaking against imbalanced settlements. Based on that experience, amici believe it is important for the Court to confirm that Rule 23(b)(3) *cy pres*-only deals are *per se* invalid in light of *cy pres*'s lack of direct class benefit, and a proposed Rule 23(b)(3) settlement must stand or fall on its direct class benefit, without consideration of *cy pres* amounts.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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